Sunningdale Tech Penang Sdn Bhd v Ketua Pengarah Kastam & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–69–11 OF 2022
WAN AHMAD FARID J
8 MAY 2024

Customs and Excise — Goods and Services Tax ('GST') — Exceptional Input tax claim — Director General of Customs allowed part of taxpayer's claim — Computation of partially allowed claim — Whether Director General of Customs allowed to adopt special formula to restrict taxpayer's exceptional Input tax claim — Whether there was breach of taxpayer's legitimate expectation — Whether Customs Appeal Tribunal correct to affirm Director General of Customs's decision in disallowing taxpayer's exceptional Input tax claim

This was an appeal against the decision of the Customs Appeal Tribunal ('the tribunal') in dismissing the appellant's appeal and affirming the first respondent's bill of demands ('BOD'), which was issued in relation to the appellant's exceptional input tax claim ('exceptional ITCs'). Between November 2016 and March 2018, the appellant incurred capital expenditure of RM48,786,157.48 (excluding 6% Goods and Sales Tax) and RM2,925,692.46 of GST in constructing a plant for its manufacturing activities. On 29 November 2018, the appellant applied for Exceptional ITCs under reg 46 of the Goods and Services Tax Regulations 2014 ('the GST Regulations'). However, the first respondent, the Director General of Customs ('DG'), did not respond to the application made by the appellant before the deadline for the appellant to file the tax return on 29 December 2018. Under the circumstances, the appellant filed its GST return on 28 December 2018 within the timeline required under s 6 of the Goods And Services Tax (Repeal) Act 2018 ('the GST Repeal Act'). In the said return, the applicant included its exceptional ITCs claim for RM2,925,692.46. However, vide a letter dated 6 September 2019, the DG rejected the appellant's application for exceptional ITCs. Dissatisfied with the rejection, the appellant appealed against it whereby the DG decided to allow the appeal only for the sum of RM31,299.55 out of the total amount of RM2,925,692.46 applied by the appellant. The partial approval letter did not provide any computation as to how the DG arrived at the partially approved amount of RM31,299.55. The DG and his officers then conducted an audit exercise on the applicant company. As a result of the audit exercise, the DG informed the appellant that it had allowed the appellant's claim to the exceptional ITCs amounting to RM117,028.46. Aggrieved by the DG's decision, the applicant filed a notice of appeal in Form A to the tribunal. In affirming the DG's decision, the tribunal held that: (a) the Customs was

allowed to adopt the special formula to restrict the appellant's exceptional ITCs claim, based on reg 57 to reg 60 of the GST Regulations enacted for capital good adjustment, which was applicable to the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations; and (b) the appellant was not allowed to rely on the Custom's Guide on input tax credit as para 59 of the Guide was inconsistent with reg 46 of the GST Regulations and there was no breach of the applicant's legitimate expectation. Dissatisfied with the decision of the tribunal, the appellant filed the present appeal. The issues that arose for determination were: (i) whether there was any provision under the Goods and Sales Tax Act ('the GST Act') or the GST Regulations that allowed the Customs Department to adopt the special formula to restrict the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations; and (ii) whether the tribunal was correct in law to affirm the DG's decision in disallowing the appellant's exceptional ITCs in respect of the fees claimed under reg 46.

Held, allowing the appeal with no order as to costs:

(1) The DG was not allowed under the law to come up with a special formula against the appellant. The attempt made by the DG in apportioning the entitlement of the appellant to RM117,028.46 had no basis in law. In the circumstances, the tribunal had erred in affirming the special formula made by the DG purportedly under s 39 of the GST Act and reg 57(2) of the GST Regulations (see para 44).

(2) In respect of TNB electric installation (item 3) and professional fees in relation to the construction of the manufacturing facility (item 4), para 59 of the Customs' Guide, made it clear that any supply of services was claimable as exceptional ITCs so long as the services were capitalised as part of the capital asset in accordance with the standard accounting principle. Although the Customs' Guidelines were issued not pursuant to any power given by law. They were what they were — mere guidelines and had no force of law. However, by issuing the Guidelines, the Customs were representing to the taxpayer, who, relying on the said representation, had acted on it. It would, therefore, be inequitable for the Customs to now say that they were not bound by the same when a taxpayer had acted on it. Therefore, the appellant had established that it had capitalised the installation of electricity by TNB and professional fees as part of the capital asset in accordance with the standard accounting principle. It was, therefore, entitled to claim for exceptional ITCs (see paras 49 & 53–55).

(3) There was no provision under the GST Act or the GST Regulations that allowed the Customs Department to adopt the special formula to restrict the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations. Thus, the tribunal had erred in affirming the DG's decision

in disallowing the appellant's exceptional ITCs in respect of items (3) and (4) claimed under reg 46 of the GST Regulations (see para 56).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Tribunal Rayuan Kastam ('tribunal') yang menolak rayuan perayu dan mengesahkan bil tuntutan responden pertama ('BT'), yang dikeluarkan berhubung dengan tuntutan cukai input luar biasa perayu ('ITC luar biasa'). Antara November 2016 dan Mac 2018, perayu melakukan perbelanjaan modal sebanyak RM48,786,157.48 (tidak termasuk 6% Cukai Barang dan Jualan) dan RM2,925,692.46 GST dalam membina loji untuk aktiviti pembuatannya. Pada 29 November 2018, perayu memohon ITC luar biasa di bawah peraturan 46 Peraturan Cukai Barang dan Perkhidmatan 2014 ('Peraturan GST'). Bagaimanapun, responden pertama, Ketua Pengarah Kastam ('KPK'), tidak menjawab permohonan yang dibuat oleh perayu sebelum tarikh akhir untuk perayu memfailkan penyata cukai pada 29 Disember 2018. Di bawah keadaan itu, perayu memfailkan pulangan GSTnya pada 28 Disember 2018 dalam garis masa yang diperlukan di bawah s 6 Akta Cukai Barang dan Perkhidmatan (Pemansuhan) 2018 ('Akta Pemansuhan GST'). Dalam penyata tersebut, pemohon menyertakan tuntutan ITC luar biasa untuk RM2,925,692.46. Bagaimanapun, melalui surat bertarikh 6 September 2019, KP menolak permohonan perayu untuk ITC luar biasa. Tidak berpuas hati dengan penolakan itu, perayu merayu terhadapnya di mana KPK memutuskan untuk membenarkan rayuan hanya untuk jumlah RM31,299.55 daripada jumlah keseluruhan RM2,925,692.46 yang dipohon oleh perayu. Surat kelulusan separa itu tidak memberikan sebarang pengiraan tentang bagaimana KPK mencapai jumlah yang diluluskan sebanyak RM31,299.55. KPK dan pegawainya kemudian menjalankan audit ke atas syarikat pemohon. Hasil daripada pelaksanaan audit, KPK memaklumkan perayu bahawa ia telah membenarkan tuntutan perayu kepada ITC luar biasa berjumlah RM117,028.46. Terkilan dengan keputusan KPK, pemohon memfailkan notis rayuan dalam Borang A kepada tribunal. Dalam mengesahkan keputusan KPK, tribunal berpendapat bahawa: (a) Kastam dibenarkan mengguna pakai formula khas untuk menyekat tuntutan ITC luar biasa perayu, berdasarkan peraturan 57 hingga peraturan 60 Peraturan GST yang digubal untuk pelarasan modal, yang telah terpakai kepada ITC luar biasa perayu yang dituntut di bawah peraturan 46 Peraturan GST; dan (b) perayu tidak dibenarkan bergantung pada Panduan Kastam mengenai Kredit Cukai Input kerana perenggan 59 Panduan itu tidak konsisten dengan peraturan 46 Peraturan GST dan tiada pelanggaran jangkaan sah pemohon. Tidak berpuas hati dengan keputusan tribunal, perayu memfailkan rayuan semasa. Isu yang timbul untuk penentuan adalah: (i) sama ada terdapat sebarang peruntukan di bawah Akta Cukai Barang dan Jualan ('Akta GST') atau Peraturan GST yang membenarkan Jabatan Kastam menerima pakai formula khas untuk menyekat ITC luar biasa yang dituntut oleh perayu di bawah peraturan 46 Peraturan GST; dan (ii) sama ada tribunal betul di sisi undang-undang untuk

mengesahkan keputusan KP dalam tidak membenarkan ITC luar biasa perayu berkenaan dengan yuran yang dituntut di bawah peraturan 46.

Diputuskan, membenarkan rayuan tanpa perintah tentang kos:

(1) KPK tidak dibenarkan di bawah undang-undang untuk menghasilkan formula khas terhadap perayu. Percubaan yang dibuat oleh KPK untuk membahagikan kelayakan perayu kepada RM117,028.46 tidak mempunyai asas undang-undang. Dalam keadaan tersebut, tribunal telah tersilap dalam mengesahkan formula khas yang dibuat oleh KPK yang kononnya di bawah s 39 Akta GST dan peraturan 57(2) Peraturan GST (lihat perenggan 44).

(2) Berkenaan dengan pemasangan elektrik TNB (perkara 3) dan fi profesional berhubung dengan pembinaan kemudahan pembuatan (perkara 4), perenggan 59 Panduan Kastam, menjelaskan bahawa sebarang pembekalan perkhidmatan boleh dituntut sebagai ITC luar biasa setakatmqnq perkhidmatan telah dipermodalkan sebagai sebahagian daripada aset modal menurut prinsip perakaunan standard. Walaupun Garis Panduan Kastam dikeluarkan tidak menurut mana-mana kuasa yang diberikan oleh undang-undang. Mereka adalah apa adanya — garis panduan semata-mata dan tidak mempunyai kuasa undang-undang. Walau bagaimanapun, dengan mengeluarkan Garis Panduan, Kastam mewakili pembayar cukai, yang, bergantung pada representasi tersebut, telah bertindak ke atasnya. Oleh itu, adalah tidak adil bagi Kastam untuk mengatakan bahawa mereka tidak terikat dengan perkara yang sama apabila pembayar cukai telah bertindak ke atasnya. Oleh itu, perayu telah menetapkan bahawa ia telah mempermodalkan pemasangan elektrik oleh TNB dan yuran profesional sebagai sebahagian daripada aset modal mengikut prinsip perakaunan standard. Oleh itu, ia berhak untuk menuntut ITC luar biasa (lihat perenggan 49 & 53–55).

(3) Tiada peruntukan di bawah Akta GST atau Peraturan GST yang membenarkan Jabatan Kastam menerima pakai formula khas untuk menyekat ITC luar biasa perayu yang dituntut di bawah peraturan 46 Peraturan GST. Oleh itu, Tribunal telah tersilap dalam mengesahkan keputusan KPK dalam tidak membenarkan ITC luar biasa perayu berkenaan dengan perkara (3) dan (4) yang dituntut di bawah peraturan 46 Peraturan GST (lihat perenggan 56).]

Cases referred to

Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors [1979] 2 MLJ 224, FC (refd)

Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd [2024] 2 MLJ 918; [2024] 2 MLRA 468, CA (refd)

Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia v Jimah East Power

Sdn Bhd [2024] 3 MLJ 314, CA (distd)
Metrogold Commercial Sdn Bhd v Ketua Pengarah Kastam [2022] MLJU 2556, HC (refd)
Nobuyasu Sdn Bhd v Tribunal Rayuan Kastam Diraja Malaysia & Anor [2020] 11 MLJ 182, HC (refd)
Zakiah bt Ishak v Majlis Daerah Hulu Selangor Darul Ehsan [2005] 6 MLJ 517, CA (refd)

Legislation referred to

Goods and Services Tax Regulations 2014 regs 39, 46, 46(1), (2), 57, 57(2), 58, 59, 60
Goods And Services Tax (Repeal) Act 2018 ss 2, 6, 38, 39, 39(1)

Ivy Ling Yieng Ping (with Chua Chun Yang and Tan Henry) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Nurul Akhilah bt Rosmi (Federal Counsel, Royal Malaysian Customs Department) for the respondents.

Wan Ahmad Farid J:

[1] There is before me an appeal against the decision of the Customs Appeal Tribunal ('the tribunal') dated 5 October 2022. The appeal is against the tribunal's decision in dismissing the appellant's appeal and affirming the first respondent's bill of demands ('BOD') dated 19 November 2020, which is issued in relation to the appellant's exceptional input tax claim ('exceptional ITCs').

[2] The ITCs are GST paid or to be paid by a Goods and Sales Tax ('GST') registered company on any goods or services used by the company for the purposes of carrying on a business. The ITCs are only claimable by a business after being GST registered. However, a GST registered business could also claim exceptional ITCs for those incurred before its GST registration pursuant to reg 46(1) of the Goods and Services Tax Regulations 2014 ('GST Regulations').

[3] Regulation 46(1) of the GST Regulations provides as follows:

> Subject to subregulation (2), the Director General may authorize a taxable person to treat as if it were input tax, any tax paid on the supply of goods to the taxable person before the date with effect from which he was, or was required to be registered, or paid by him on imported goods before that date, for the purpose of a business which was carried on or was to be carried on by him at the time of such supply or payment.

[4] The appellant is a company registered in Malaysia having its address at Taman Perindustrian Batu Kawan, Pulau Pinang. Its principal business activity

includes the manufacturing of finished plastic products.

[5] The appellant is a GST registered company effective 1 August 2018.

THE FACTUAL BACKGROUND

[6] The appellant's case is as follows. Between November 2016 and March 2018, the appellant incurred capital expenditure of RM48,786,157.48 (excluding 6% Goods and Sales Tax) and RM2,925,692.46 of GST in constructing a plant for its manufacturing activities in Batu Kawan.

[7] The plant was certified completed on 6 March 2018.

[8] On 29 November 2018, the appellant applied for exceptional ITCs under reg 46 of the GST Regulations. The letter, inter alia, states as follows:

> [We] wish to seek for the kind approval from the Royal Malaysian Customs Department ('Customs') with respect to Sunningdale Tech Penang Sdn Bhd ('STP' or 'the Company') exceptional claims for input tax pertaining to the capital goods acquired before the effective date of GST registration, amounting to RM2,925,692.46.

However, the first respondent, the Director General of Customs ('DG'), did not respond to the application made by the appellant before the deadline for the appellant to file the tax return on 29 December 2018.

[9] Under the circumstances, the appellant had no option but to file its GST return on 28 December 2018 within the timeline required under s 6 of the Goods And Services Tax (Repeal) Act 2018 ('the GST Repeal Act'). In the said return, the applicant included its exceptional ITCs claim for RM2,925,692.46. The appellant's argument is that, under ordinary circumstances, if the appellant had been GST registered at the time of constructing the manufacturing facilities in Batu Kawan, the appellant would be entitled to claim 100% of all the input tax credits.

[10] The sum of RM2,925,692.46 is derived as follows:

No	Type	GST Input Tax (RM)
1	Building	1,295,524.03
2	Machinery and IT tools	838,465.60
3	TNB electric installation	9,263.10
4	Professional fees in relation to the construction of the manufacturing facility	393,204.73
5	Purchase tax invoice after the appellant's GST registration on 1 August 2018	89,235.00

No	Type	GST Input Tax (RM)
	TOTAL	2,925,692.46

[11] However, vide a letter dated 6 September 2019, the DG rejected the appellant's application for exceptional ITCs. The letter from the DG states, inter alia, as follows:

> Permohonan tuan untuk menuntut kredit cukai input luar sebelum tarikh kuatkuasa Pendaftaran GST tidak dapat dipertimbangkan selaras dengan pemansuhan Akta Cukai Barang dan Perkhidmatan (Pemansuhan) 2018.

[12] Dissatisfied with the rejection of the appeal, the appellant appealed against it.

[13] Vide a letter dated 21 July 2020, the DG decided to allow the appeal only for the sum of RM31,299.55 out of the total amount of RM2,925,692.46 applied by the appellant. The partial approval letter did not provide any computation as to how the DG arrived at the partially approved amount of RM31,299.55. Paragraph 5 of the letter states as follows:

> Pihak kami telah melakukan verifikasi yang lengkap ke atas segala maklumat serta dokumen-dokumen yang dikemukakan. Justeru, selaras dengan peruntukan undang-undang di bawah Seksyen 4 dan Seksyen 8, Akta Cukai Barang dan Perkhidmatan (Pemansuhan) 2018, maka permohonan Sunningdale Tech Penang Sdn Bhd adalah diluluskan pada nilai RM31,299.55 sahaja ...

[14] The DG and his officers then conducted an audit exercise on the applicant company. As a result of the audit exercise, the DG, vide his letter dated 21 October 2020, informed the appellant that it had allowed the appellant's claim to the exceptional ITCs amounting to RM117,028.46.

[15] After a roundtable discussion ('RTD') held between the parties, the DG informed that the Customs Department maintained its audit finding that the appellant was only entitled to claim RM117,028.46 out of the total RM2,925,692.46 claimed.

[16] The said sum of RM117,028.46 was refunded to the appellant on 19 May 2021.

[17] Aggrieved by the DG's decision, the applicant filed a notice of appeal in Form A to the tribunal.

AT THE TRIBUNAL

[18] In affirming the DG's decision, the tribunal held that:

(a) the Customs is allowed to adopt the special formula to restrict the appellant's exceptional ITCs claim. The special formula is based on regs 57 to 60 of the GST Regulations enacted for capital good adjustment, which is applicable to the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations; and

(b) the appellant is not allowed to rely on the Custom's Guide On Input Tax Credit as para 59 of the guide is inconsistent with reg 46 of the GST Regulations and there is no breach of the applicant's legitimate expectation. In para 75 of the grounds of decision, the tribunal further held as follows:

> Tribunal turut mendapati perenggan 59 di dalam panduan tersebut bertentangan dengan peraturan 46 PPCBP di mana peraturan 46 secara terang dan jelas menyatakan bahawa hanya PEMBEKALAN BARANG sahaja boleh dituntut sebagai cukai input luar biasa. Peruntukan peraturan 46 PPCBP 2014 itu langsung tidak menyebut bahawa pembekalan perkhidmatan dibolehkan di bawah peraturan 46 selagi ianya telah dipermodalkan.

[19] For the aforesaid reasons, the appellant's appeal was dismissed by the tribunal and the decision of the DG was affirmed.

AT THE HIGH COURT

[20] Dissatisfied with the decision of the tribunal, the appellant filed an appeal to this court.

[21] The issues before this court are as follows:

(a) whether there is any provision under the GST Act or the GST Regulations that allows the Customs Department to adopt the special formula to restrict the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations; and

(b) whether the tribunal is correct in law to affirm the DG's decision in disallowing the appellant's exceptional ITCs in respect of the fees claimed under reg 46.

[22] The grounds of the appellant's appeal can be summarised as follows. First, learned counsel for the appellant submitted that the tribunal had failed to interpret reg 46 correctly. According to learned counsel, reg 46(1) is a specific provision that allows GST registered businesses, like the appellant, to claim

exceptional ITCs for any GST paid 'before the date with effect from which he was registered'.

[23] Reg 46(2) of the GST Regulations provides that:

> (2) No tax may be treated as if it were input tax in respect of —
>
> (a) goods which had been supplied or consumed;
>
> (b) goods which have been used partially or incorporated into some other goods; or
>
> (c) goods held for other than business use,
>
> by the person referred to in subregulation (1) before the date with effect from which such person was, or was required to be, registered.

In short, learned counsel submitted that reg 46(2) sets out the conditions or restrictions applicable to the claim.

[24] Learned counsel's line of argument is this. By implementing the special formula, the DG is, in effect, restricting the amount claimable by the appellant based on the number of days the appellant has been GST registered. According to learned counsel, this is not the condition stipulated in reg 46(2).

[25] Learned counsel that referred me to the judgment of the High Court in *Metrogold Commercial Sdn Bhd v Ketua Pengarah Kastam* [2022] MLJU 2556, which held that there is no express provision under reg 46 of the GST Regulations that provides any formula in determining the amount of the exceptional ITCs' claim. According to the learned judge, it is trite that in a taxing Act, one can only look fairly at the language used, what is clearly said, and that nothing is to be read in nor implied.

[26] In short, learned counsel submitted that the special formula adopted by the DG is not prescribed by reg 46. The attendant consequence is that the DG is not entitled to impose additional requirements without any legal basis.

[27] Secondly, learned counsel for the appellant contended that any formula applied by the DG must be expressly provided either under the GST Act or GST Regulations. Learned counsel submitted that the special formula adopted by the DG is nowhere to be found in the GST Act, GST Regulations or even the Custom's guide.

[28] The extension of the argument is that had the Parliament or the Minister of Finance intended to adopt a formula for exceptional ITCs claim under reg 46, they would have expressly stated so.

[29] Thirdly, the appellant contended that the tribunal had erred in applying regs 57 to 60 of the GST Regulations relating to capital good adjustments to the instant case, which, according to learned counsel, is completely irrelevant. In para [69] of its grounds of decision, the tribunal held as follows:

> Formula khas yang digunakan oleh JKDM Putrajaya dan Pulau Pinang adalah sah berlandaskan peruntukan undang-undang di bawah peraturan 57 hingga 60 PPCBP 2014 terutamanya peraturan 59(8)(i) yang menyatakan: '*hendaklah termasuk*' cukai input di bawah peraturan 46 ...

[30] In short, learned counsel submitted that the capital goods adjustment is unrelated to the issue of whether the appellant is entitled to exceptional ITCs under reg 46. Capital goods adjustment under regs 57 to 60 are inapplicable to wholly taxable suppliers such as the appellant.

[31] Finally, learned counsel for the appellant submitted that the appellant has a legitimate expectation that the Customs would honour the representations made in their own guide. In particular, relying on the Customs' Guide, the appellant capitalised the costs of constructing the Batu Kawan factory in accordance with the standard accounting principles, applied for GST registration and exceptional ITCs claim.

[32] My attention was drawn to the evidence given by the Customs' witness, Fartani Jahiku, during cross-examination at the hearing before the tribunal:

> Q10: Rujuk ms 47, bundle C: Betulkah dalam perenggan 59 panduan kredit cukai input, mana-mana perkhidmatan berkaitan harta modal tidak boleh dituntut di bawah Peraturan 46 GSTR melainkan ia dapat dipermodalkan mengikut prinsip perakaunan standard di Malaysia, sebelum tarikh perniagaan itu perlu didaftarkan bagi tujuan GST. Ya atau tidak.
>
> A10: Ya.

[33] Learned counsel for the appellant contended that the appellant had fulfilled all the conditions required in the Customs' Guide to claim the exceptional ITCs with respect to the fees incurred. In the circumstances, the appellant has a legitimate expectation that Customs would act in accordance with the Customs' Guide.

THE RESPONSE FROM THE CUSTOMS

[34] On behalf of the Customs, the learned federal counsel submitted that the special formula adopted by the Customs was based on regs 57 to 60 of the GST Regulations. According to the learned FC, the calculation method in the Regulations is similar to the special formula used by the Customs.

[35] In any event, the learned FC contended that reg 60 of the GST Regulations provides that the DG may allow another method by which, or may direct the manner in which, the extent to which a capital asset is used in making taxable supplies in any subsequent interval applicable to it shall be ascertained.

[36] The learned FC further submitted that reg 46 of the GST Regulations must be read together with ss 38 and 39 of the GST Act. Section 39(1) provides that the taxable person's entitlement to input tax is so much of what is 'allowable' and 'reasonable'. Section 39(1) does not provide any fixed formula on what is reasonable or allowable. The extension of the FC's argument is that although the special formula devised by Customs is not expressly provided for, it does not, ipso facto, render it 'not allowable' or 'not reasonable' under s 39(1) of the GST Act.

[37] As to items (3) and (4) of the appellant's claim, the learned FC submitted that the installation of electricity by TNB and professional fees are not goods supplied to the appellant. In the circumstances, the learned FC argued that they do not qualify for exceptional ITCs under reg 46(1) of the GST Regulations.

[38] In any event, the learned FC further submitted that the appellant only made a bare claim that they had capitalised those costs according to standard accounting principles. However, according to the learned FC, the appellant failed to prove at the tribunal that such expenses had been capitalised.

THE ANALYSIS

[39] Let me begin by referring to the judgment of the High Court in *Nobuyasu Sdn Bhd v Tribunal Rayuan Kastam Diraja Malaysia & Anor* [2020] 11 MLJ 182. In that case, the appellant claimed the input tax pursuant to reg 46(1) of the GST Regulations. Meanwhile, on 1 September 2018, the Act was repealed. The DG then informed the appellant that the appellant was entitled to the input claim but only 3.36% of the total amount incurred by the appellant in constructing the warehouse, which amounted to RM33,963.70. Dissatisfied, the appellant eventually filed an appeal to the tribunal. The tribunal dismissed the appeal. Hence, the appellant appealed to the High Court.

[40] At the High Court, Nordin Hassan J (now FCJ) held that the words in reg 46(1) of the GST Regulations were plain and unambiguous that the applicant was entitled to the ITCs' claim, which was admitted by the DG and the tribunal. According to the learned judge, there was nothing in reg 46(1) or any other provisions in the GST Act that expressly provided for the reduction and apportionment of the ITC including the formula for the said reduction or

apportionment. Here, the respondents' reliance on ss 2, 38 and 39 of the GST Act and reg 39 of the GST Regulations was misconceived and untenable. A

[41] The learned judge further held there were no express provisions under the law for the DG to reduce the appellant's ITC nor any formula prescribed for the said reduction and apportionment of the ITC. If the law does not prescribe any formula or give any power for the said reduction or apportionment, it simply means that it cannot be done. There was no reason for the appellant not to receive the amount claimed as the claim was allowable under the law and reasonable as the appellant had justified it. B C

[42] With respect, I am entirely in agreement with the aforesaid proposition.

[43] The judgment of the High Court in *Metrogold Commercial* was affirmed by the Court of Appeal in *Ketua Pengarah Kastam v Metrogold Commercial Sdn Bhd* [2024] 2 MLJ 918; [2024] 2 MLRA 468 (CA). Mohd Nazlan JCA, in delivering the judgment of the court held that: D

> For the above reasons, we are of the view that the decision of the appellant not to allow any refund under s 38 of the GST Act despite the clear provisions authorising the same, and its decision to invoke reg 46 to apportion the respondent's ITC claim which allowed only the reduced amount of RM2,320,472.55 and disallowed the rest are not only erroneous, but also ultra vires, in excess of the appellant's authority, unreasonable as well as an illegality, the net effect of which more than justified the learned HCJ to have allowed the judicial review of the said impugned decision, against the appellant. E F

[44] To summarise, the attempt made by the DG in the instant case in apportioning the entitlement of the appellant to RM117,028.46 has no basis in law. In the circumstances and with respect, the tribunal had erred in affirming the special formula made by the DG purportedly under s 39 of the GST Act and reg 57(2) of the GST Regulations. In short, the DG is not allowed under the law to come up with a special formula against the appellant as in this case. G

[45] The learned FC then referred me to the recent judgment of the Court of Appeal in *Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia v Jimah East Power Sdn Bhd* [2024] 3 MLJ 314. H

[46] Azizah Nawawi JCA, in delivering the judgment of the court, held that: I

> The respondent's first taxable period was between 1 August 2016 to 31 August 2018. However, the operations of the power plant in generating electricity supply only started on 10 December 2018, after the abolishment of the GST. Therefore, the DG is not statutorily authorised to allow the respondent to treat as input tax the GST amount of RM45,873,669.66 under reg 46(1) of the GST Regulations

A because the amount incurred by the respondent is not attributable to the taxable supply made by the respondent and therefore cannot be treated as an input tax.

B **[47]** In contrast, the appellant in the instant case, had completed the construction of its factory in March 2018 and had been supplying plastic products to its customers since April 2018, well before the abolishment of the GST Act, which was repealed with effect from 1 September 2018. In the circumstances, *Jimah East Power* is distinguished.

C **[48]** In any event, the Court of Appeal in *Jimah East Power* never held that the DG is entitled to use special formula in his attempt to apportion the exceptional ITCs under reg 46 of the GST Regulations.

D **[49]** Secondly, on items (3) and (4), learned counsel for the appellant referred me to para 59 of the Customs' Guide, which made it clear that any supply of services is claimable as exceptional ITCs so long as the services (in the instant case items (3) and (4)) are capitalised as part of the capital asset in accordance to the standard accounting principle.

E **[50]** It is to be noted that the appellant's audited financial report for the year ended 2018 showed capitalisation of items (3) and (4) in Years 2017 and 2018 under 'property, plant and equipment'.

F **[51]** During the oral submissions before me, learned counsel conceded that the Customs' Guide has no force of law. But learned counsel invited this court to address the issue from the perspective of the legitimate expectation.

G **[52]** The law can be traced in the judgment of the Court of Appeal in *Zakiah bt Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517 (CA) where it was held that for legitimate expectation to arise, there must be evidence of a promise or undertaking made by the respondent to that effect. Arifin Zakaria FCJ (as the former Chief Justice then was) remarked as follows:

H In law for legitimate expectation to arise there must be evidence of a promise or undertaking made by the respondent to that effect.

I **[53]** Admittedly, the Customs' guidelines were issued not pursuant to any power given by law. They are what they are — mere guidelines and have no force of law. At best, they are of advisory character; see for eg *Ho Kok Cheong Sdn Bhd & Anor v Lim Kay Tiong & Ors* [1979] 2 MLJ 224.

[54] However, by issuing the guidelines, the Customs are representing to the taxpayer, who, relying on the said representation, had acted on it. It would,

therefore be inequitable for the Customs to now say that they are not bound by the same when a taxpayer has acted on it.

[55] I therefore hold that the appellant had established that it had capitalised the installation of electricity by TNB and professional fees as part of the capital asset in accordance with the standard accounting principle. It is therefore entitled to claim for exceptional ITCs.

FINDINGS

[56] For the reasons aforesaid, my findings on the issues raised are as follows:

(a) there is no provision under the GST Act or the GST Regulations that allows the Customs Department to adopt the special formula to restrict the appellant's exceptional ITCs claimed under reg 46 of the GST Regulations; and

(b) the tribunal had erred in affirming the DG's decision in disallowing the appellant's exceptional ITCs in respect of items (3) and (4) claimed under reg 46 of the GST Regulations.

[57] In the circumstances, the appeal is allowed.

[58] The appellant's claim for the full amount of RM2,925,692.46 as the ITCs claim is also allowed minus part of the refund made to the appellant on 19 May 2021.

[59] There shall be no order as to costs.

Appeal allowed with no order as to costs.

Reported by K Selvaraju